Filed 5/25/07 Villar v. Mutual Protection Plus CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROMEO VILLAR, M.D., Plaintiff and Respondent, v. MUTUAL PROTECTION TRUST et al., Defendants and Appellants.	B191760 (Los Angeles County Super. Ct. No. BC346502)

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Maureen Duffy-Lewis, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Bruce S. Bolger, and Allison A. Arabian for Defendants and Appellants.

The Law Office of Jack R. Ormes and Jack R. Ormes for Plaintiff and Respondent.

Defendants and appellants Mutual Protection Trust (MPT), Thomas K. Ciesla, M.D. (Ciesla), Elizabeth Galton, M.D. (Galton), Maria T. Lymberis, M.D. (Lymberis), and Daniel B. Borenstein, M.D. (Borenstein), (collectively, defendants), appeal from the trial court's order denying their petition to compel arbitration of an action filed by plaintiff and respondent Romeo Villar, M.D. (plaintiff). The trial court based its ruling on the absence of a valid agreement to arbitrate. We reverse the trial court's order denying the petition to compel arbitration. A valid and enforceable agreement to arbitrate was formed between the parties.

BACKGROUND

A. The Parties

MPT is an interindemnity trust arrangement organized pursuant to Insurance Code section 1280.7 to provide insurance coverage for medical malpractice claims to its member physicians. Plaintiff is a physician who applied for and was accepted for membership in MPT. Defendants Ciesla, Galton, Lymberis, and Borenstein are MPT members who served on a peer review committee that recommended terminating plaintiff's membership in MPT.

B. Plaintiff's Application for Membership in MPT

In May 1996, plaintiff completed and signed an application for membership in MPT. The application form contained the following acknowledgment: "I acknowledge that I have received and read a copy of the MPT Trust Agreement and Disclosure Statement and, by affixing my signature below, I agree that upon acceptance of my application by MPT and payment by me of my Initial Trust Deposit, I will be deemed to have become a party to the Trust Agreement."[1]

By letter dated May 21, 1996, MPT informed plaintiff that he had been accepted for membership. The letter stated that plaintiff's membership would afford him

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[1] The application form also contained an arbitration provision that is not at issue here.

professional liability coverage effective as of May 1, 1996 and prior acts coverage for the period April 1, 1991 through April 30, 1996, provided MPT received within 30 days a copy of the May 21, 1996 letter, signed by plaintiff evidencing his acceptance of membership, and payment of plaintiff's initial trust deposit and dues. The letter further stated: "Your signature on this letter acknowledges that you have received and read a copy of the MPT Agreement, the MPT Disclosure Statement along with other documents enclosed with your application. Your signature on this letter also constitutes execution of the MPT agreement . . . ." Plaintiff countersigned and returned to MPT a copy of the May 21, 1996 letter, paid the required deposit and dues, and was accepted for membership in MPT.

C. The MPT Agreement

The MPT trust agreement (the MPT Agreement) requires MPT members to make an initial trust contribution and to pay dues and assessments to a trust fund corpus managed by a board of trustees. MPT uses income earned from the trust fund to provide coverage for malpractice claims that arise during the coverage period. The MPT Agreement contains an involuntary termination provision permitting the board of trustees to terminate a physician's membership when the board "determines that such termination is in the best interests of MPT even though such Member has complied with all of the provisions of [the MPT] Agreement." Under the involuntary termination provisions of the MPT Agreement, a physician whose membership has been involuntarily terminated may call a special meeting of all MPT members to vote on whether the member should not be terminated.

Article X of the MPT Agreement contains an arbitration provision that provides as follows: "Any dispute or controversy arising under, out of, in connection with or in relation to this Agreement shall be submitted to, and determined and settled by, arbitration in Los Angeles, California, before a single neutral arbitrator or, if requested by MPT or the Member, before a panel of three (3) arbitrators; provided, however, that MPT may seek judicial action to recover any amounts which are owing by any MPT Member pursuant to Article VII hereof; and provided further, however, that MPT may seek

judicial action in connection with the dissolution of MPT pursuant to Article IX hereof. Any demand for arbitration by an MPT Member under this Agreement must be made within 12 months of the denial by MPT of the defense or payment, whether in whole or in part, of the Claim from which the dispute or controversy arises. A demand for arbitration must be communicated in writing to all parties. The parties shall select the single neutral arbitrator within 30 days after receipt of the demand. If a three-person panel is requested, each party shall select an arbitrator ['party arbitrator'] within 30 days after receipt of the demand. A third arbitrator ['neutral arbitrator'] shall be selected by the party arbitrators within 30 days thereafter. Attorneys' fees and costs incurred in the arbitration, in compelling arbitration or in enforcing any award in arbitration together with the compensation of the arbitrator shall be awarded to the prevailing party in any arbitration. [¶] This provision shall constitute a written agreement to submit to arbitration and shall be binding on the parties whether or not any of such parties are current MPT Members, were terminated voluntarily or involuntarily from MPT Membership under any provision of this Agreement, have transferred Membership, or are retired or disabled. This Agreement shall also be binding upon any beneficiaries and the estate of any deceased Member. Any award rendered in an arbitration pursuant to this article shall be final and binding on each of the parties hereto, and judgment thereon may be entered in any court of competent jurisdiction. The parties agree that any such award shall also be final and binding in a direct action against MPT by any judgment creditor of an MPT Member."

D. Termination of Plaintiff's Membership

After plaintiff became a member of MPT, he was named as a defendant in medical malpractice action. By letter dated December 27, 2004, MPT's peer review committee advised plaintiff that it was meeting to discuss his care and treatment of the patient in the medical malpractice action, to evaluate his continued membership in MPT, and to deliberate and vote concerning his continued membership. The peer review committee convened in February 2005 and voted to recommend that plaintiff's membership be terminated. By letter dated February 24, 2005, plaintiff notified the peer review committee that he was invoking his right under the involuntary termination provision of

the MPT Agreement to call a special meeting of all MPT members to vote upon the committee's recommendation.

On March 17, 2005, MPT's board of trustees met to consider the peer review committee's recommendation and upheld the decision to terminate plaintiff's membership. By letter dated March 18, 2005, MPT informed plaintiff of the board's decision and advised him of his right to elect to receive continued coverage for the medical malpractice claim that had been asserted against him, and to submit to arbitration any dispute arising under the MPT Agreement. On March 26, 2005, plaintiff sent a letter invoking his right to submit the dispute to binding arbitration in accordance with article X of the MPT Agreement.

On March 31, 2005, an MPT representative discussed with plaintiff the option of changing his membership to a nonprivate practice status. Under this option, MPT would not terminate plaintiff's membership if he elected to practice medicine in a setting other than private practice. Plaintiff elected to continue his membership as a nonprivate practice member and notified MPT that he was withdrawing his notice of arbitration.

E. Plaintiff's Lawsuit and the Petition to Compel Arbitration

On January 27, 2006, plaintiff filed an action against defendants for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and misrepresentation. Plaintiff attached as exhibits to the complaint portions of the MPT Agreement, including the arbitration provision contained in article X. Plaintiff subsequently filed a first amended complaint in which he alleged that MPT's peer review committee had negligently investigated plaintiff's care of the patient who had sued him for medical malpractice; that the committee had conspired to expel him from membership in MPT based on his race and religion; and that MPT did not use plaintiff's contributions to provide coverage for malpractice claims as required under the MPT Agreement. Based on these allegations, plaintiff asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and misrepresentation, and discrimination.

Defendants filed a petition to compel arbitration, arguing that a valid and enforceable agreement to arbitrate with plaintiff existed, and that the agreement covered all of the claims asserted in the first amended complaint. The petition was supported by a declaration by an MPT member services representative, who authenticated plaintiff's application for membership and various documents and correspondence concerning plaintiff's membership.

Without obtaining leave of court to do so, plaintiff filed a second amended complaint asserting additional claims for intentional and negligent interference with prospective economic advantage and breach of fiduciary duty. In response, defendants supplemented their petition to arbitrate, informing the trial court that they would not be responding to the unauthorized second amended complaint.

Plaintiff opposed defendants' petition to arbitrate, arguing that the arbitration agreement was a contract of adhesion and unconscionable, that MPT had forfeited the right to arbitrate by breaching the covenant of good faith and fair dealing, and that he had never signed the MPT Agreement that contained the arbitration provision. Plaintiff's opposition was supported by his own declaration, in which he states that he was never told that disputes with MPT would be subject to arbitration, that he was never offered an opportunity to negotiate any terms of the MPT Agreement, that he understood his application for membership in MPT to be "a take it or leave it offer," and that he knew of no other source of insurance coverage with rates as favorable as MPT's. Plaintiff's declaration further states that he was "surprised" by MPT's request for arbitration because he never intended to waive his right to a jury trial.

Defendants' petition to compel arbitration was heard on May 9, 2006. After hearing argument from the parties, the trial court stated: "[O]ne of the problems that I found in this was that the agreement does not even say how the arbitration is to be conducted, nor who shall conduct it. It's left in an open ended, ambiguous kind of state. And since this is the burning issue here, the court finds, to simply say that the matter is to go to arbitration, is not specific enough, and the court finds that in fact there's no real

meeting of the minds, that one can rely upon, so the motion is denied." The trial court issued a minute order denying the petition to compel arbitration. This appeal followed.

DISCUSSION

I. Applicable Law and Standard of Review

"The right to arbitration depends on a contract. [Citations.] Accordingly, a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so. [Citation.]" (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. of Maryland* (1992) 6 Cal.App.4th 1266, 1271, fn. omitted.) In a motion to compel arbitration, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance any fact necessary to its defense. [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*).) "[A]n agreement need not *expressly* provide for arbitration, but may do so in a secondary document which is incorporated by reference." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 639 (*Chan*); *King v. Larsen Realty, Inc.* (1981) 121 Cal.App.3d 349, 357 (*King*).)

When adjudicating a motion to compel arbitration, "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Engalla, supra*, 15 Cal.4th at p. 972.) A reviewing court will uphold the trial court's resolution of disputed facts if supported by substantial evidence. When there is no disputed extrinsic evidence considered by the trial court, its decision concerning arbitrability is reviewed de novo. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277 (*Nyulassy*).)

II. Existence of Agreement to Arbitrate

Substantial evidence does not support the trial court's determination that a valid agreement to arbitrate had not been formed. The undisputed evidence is to the contrary. Plaintiff countersigned a letter dated May 21, 1996, that states: "Your signature on this letter acknowledges that you have received and read a copy of the MPT Agreement" and

"[y]our signature on this letter also constitutes execution of the MPT Agreement." The MPT Agreement contains an agreement to arbitrate "[a]ny dispute or controversy arising under, out of, in connection with or in relation to this Agreement." The arbitration provision further states that: "This provision shall constitute a written agreement to submit to arbitration and shall be binding on the parties whether or not any of such parties are current MPT Members, were terminated voluntarily or involuntarily from MPT Membership under any provision of this Agreement, have transferred Membership, or are retired or disabled." Plaintiff does not claim that he did not receive or read a copy of the MPT Agreement; he simply argues that he did not intend to waive his right to a jury trial. As a general rule, arguments that a party did not understand the significance of an arbitration provision, or did not knowingly waive its right to a jury trial, may not be used to invalidate a written arbitration provision. (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109.)

Plaintiff argues that the May 21, 1996 letter he signed contains no agreement to arbitrate. An agreement to arbitrate need not be contained in the body of the contract itself, but may be contained in a collateral document that is incorporated by reference. (*Chan*, *supra*, 178 Cal.App.3d at p. 639; *King*, *supra*, 121 Cal.App.3d at p. 357.) "A secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference provided that the terms of the incorporated document are readily available to the other party. [Citation.]" (*King*, *supra*, 121 Cal.App.3d at p. 357.) The MPT Agreement was readily available to plaintiff, who acknowledged having received and read that agreement. By countersigning the May 21, 1996 letter approving his application for membership, plaintiff agreed to be bound by the terms of the MPT Agreement, including the arbitration provisions set forth in that agreement.

The facts presented here are indistinguishable from those in *King*. In that case, an applicant seeking membership in a local real estate board signed an application form in which he agreed to abide by the board's bylaws, which imposed on members the duty to arbitrate on the terms set forth in the California Association of Realtors arbitration

manual. The applicant had read the bylaws as part of the application process, and the arbitration manual was readily available to him. The court held that the applicant's agreement to abide by the board's bylaws was a valid agreement to arbitrate. (*King, supra,* 121 Cal.App.3d at p. 357.) Here, as in *King,* plaintiff was provided with a copy of the MPT Agreement and had read the terms of that agreement. Plaintiff's signature on the May 21, 1996 letter evidenced his agreement to be bound by the terms of the MPT Agreement, including the agreement to arbitrate set forth in article X of that agreement. A valid agreement to arbitrate was thus formed between the parties.

Plaintiff's subsequent conduct demonstrates that he was cognizant of the agreement to arbitrate and that he believed that agreement to be valid and enforceable. Plaintiff himself invoked article X of the MPT Agreement in a written request to arbitrate he sent to defendants in March 2005. Plaintiff attached article X of the MPT Agreement to the complaint he subsequently filed against defendants in which he asserted a cause of action for breach of that agreement.

The trial court erred by concluding that no agreement to arbitrate had been formed because the arbitration provision did not refer to any rules of arbitration or specify "how the arbitration is to be conducted, []or who shall conduct it." The agreement to arbitrate states that the parties shall select a single neutral arbitrator within 30 days after receipt of a demand for arbitration. The agreement also sets forth alternative procedures for the selection of a three-person panel of arbitrators. Despite the trial court's statement to the contrary, the agreement to arbitrate thus adequately provides for the selection of an arbitrator or arbitrators. Even if these provisions prove to be inadequate, the "failure to designate an arbitrator (or a procedure for selection of the arbitrator) does not render an arbitration agreement unenforceable." (Knight, et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2006) ¶ 5.24, p. 5-13.) The parties may agree on a

method of appointing an arbitrator, or, if necessary, a court may appoint an arbitrator. (Code Civ. Proc., § 1281.6.)[2]

That the parties' agreement to arbitrate does not refer to or incorporate specified arbitral rules does not preclude its enforcement. The selection of arbitral rules is not a prerequisite to forming a valid agreement to arbitrate. (See Knight, et al., Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 5.26.11, p. 5-18 ["If the parties designate an ADR provider (e.g., AAA) to administer the arbitration but not which rules will govern the arbitration, the provider is authorized to decide the matter"].) The parties' failure to specify arbitral rules or procedures for conducting the arbitration did not nullify their agreement to arbitrate.

III. Enforceability of Agreement to Arbitrate

The trial court did not reach the issue of whether the agreement to arbitrate was enforceable, although the parties presented evidence and argument on this issue below. Because we hold that a valid agreement to arbitrate exists, we address its enforceability.

Plaintiff contends the arbitration provision is an unenforceable contract of adhesion because he had no opportunity to negotiate that provision. Plaintiff further contends the arbitration provision is unconscionable because it gives MPT the unilateral right to seek judicial action to recover dues and assessments owed by members under the terms of the MPT Agreement, and in connection with the dissolution of MPT.

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) California law favors the enforcement of arbitration agreements and any "doubts

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[2] Code of Civil Procedure section 1281.6 provides in relevant part: "If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator."

concerning the scope of arbitrable issues are to be resolved in favor of arbitration. [Citations.]" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323.) Under general principles of contract law, an agreement to arbitrate may be invalidated if it contains a provision that is "unconscionable or contrary to public policy." (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 711.) "[T]he party opposing arbitration has the burden of proving the arbitration provision is unconscionable. [Citation.]" (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099.) "Whether an arbitration provision is unconscionable is ultimately a question of law. [Citation.]" (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1250.)

The doctrine of unconscionability "has '"both a 'procedural' and a 'substantive' element," the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh'" or '"one-sided'" results.' [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, '"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."' [Citation.] . . . . [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. . . ." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Both procedural and substantive unconscionability must be present before a court may refuse to enforce a contract as unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) As we discuss, plaintiff has failed to meet his burden of establishing procedural and substantive unconscionability.

A. Procedural Unconscionability

"'Procedural unconscionability' concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] It focuses on factors of oppression and surprise. [Citation.] The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. [Citations.]" (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329 (*Kinney*).) The

component of surprise arises when the challenged terms are "hidden in a prolix printed form drafted by the party seeking to enforce them. [Citations.]" (*Ibid.*)

Plaintiff submitted a declaration stating that he was never told that disputes with MPT would be subject to arbitration, that he was never offered an opportunity to negotiate any terms of the MPT Agreement, that he understood his application for membership in MPT to be "a take it or leave it offer," and that he knew of no other source of insurance coverage with rates as favorable as MPT's. Plaintiff's declaration further states that he was "surprised" by MPT's request for arbitration because he never intended to waive his right to a jury trial. Even assuming this evidence is sufficient to establish oppression as a component of procedural unconscionability, it is insufficient to establish the component of surprise. (See *Kinney, supra*, 70 Cal.App.4th at p. 1329.)

The weight of the evidence shows that the arbitration provision at issue was clearly set forth in the MPT Agreement and that plaintiff was aware of the provision. The arbitration provision was not hidden within the text of the MPT Agreement, but was clearly set forth in a separate article of the agreement captioned "Arbitration." Plaintiff acknowledged receiving and reading a complete copy of the MPT Agreement. Plaintiff himself sought to invoke the right to arbitrate under the MPT Agreement in March 2005 by sending a request to arbitrate MPT's decision to terminate his membership. Finally, plaintiff attached the arbitration provision to the complaint he filed against defendants. Given these circumstances, he cannot reasonably claim to have been surprised by defendants' request to arbitrate. Plaintiff failed to establish that the arbitration provision at issue is procedurally unconscionable.

B. Substantive Unconscionability

Plaintiff has also failed to establish substantive unconscionability. "'Substantative unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "*shock the conscience*."' [Citations.]" (*Kinney, supra*, 70 Cal.App.4th at p. 1330.) "'[T]he paramount consideration in assessing [substantive] conscionability is mutuality.' [Citation.]" (*Nyulassy, supra*, 120 Cal.App.4th at p. 1281.)

The arbitration clause at issue satisfies the requirement of mutuality. It applies to "[a]ny dispute or controversy arising under, out of, in connection with or in relation to this Agreement." It applies equally to both parties by providing that an award rendered in arbitration "shall be final and binding on each of the parties."

Plaintiff argues that the provision is one-sided because it gives MPT greater rights than those provided to members by allowing MPT to seek judicial action to recover dues or assessments owed by members, or in connection with the dissolution and winding up of MPT. Absence of mutuality in a given context, however, does not necessarily invalidate an agreement to arbitrate. (*Armendariz, supra*, 24 Cal.4th at pp. 117-118.) An arbitration provision may provide a party with greater bargaining strength "a type of extra protection for which it has a legitimate commercial need without being unconscionable. [Citation.]" (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1536.) MPT contends that it has a legitimate business need to be able to seek judicial action to obtain money judgments against delinquent members or to seek dissolution or winding up of its business affairs. It argues that as an interindemnity trust, it must maintain sufficient funds to cover potential claims against its members, and that prompt collection of member dues and assessments is therefore essential. MPT also argues that arbitration makes little sense in the context of a dissolution, which requires a vote of more than a majority of the members. These limited exceptions to the obligation to arbitrate are justified by a legitimate commercial need. Moreover, the exceptions to arbitration specified in the MPT Agreement are not at issue here, as plaintiff's dispute with defendants involves neither the nonpayment of dues nor the dissolution of MPT or the winding up of its business affairs. Plaintiff has thus failed to establish that the arbitration provision is substantively unconscionable.

DISPOSITION

The order denying the petition to compel arbitration is reversed. Defendants are awarded their costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD